Millard Refrigerated Services, Inc. *and* United Food & Commercial Workers Local Union 230.[1] Case 18–RC–16665

September 30, 2005

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The National Labor Relations Board has considered challenges in, and objections to, an election held on June 23, 2000, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 29 for and 22 against the Petitioner, with 8 challenged ballots, a number sufficient to affect the outcome of the election.[2]

The Board has reviewed the record in light of the exceptions and briefs, and has decided to adopt the hearing officer's rulings, findings,[3] and recommendations only to the extent consistent with this decision, and finds that the election must be set aside and a new election held.

The Challenged Ballots

The Petitioner seeks to represent a unit of all of the Employer's production and maintenance employees, including those referred to by the hearing officer as "leads" and "assistant leads." The Employer challenged the ballots of six leads on the basis that they are statutory supervisors. The hearing officer recommended that these challenges be sustained, and there are no exceptions to this recommendation. Therefore, we adopt the hearing officer's recommendation pro forma, and we find that the six leads are supervisors as defined in Section 2(11) of the Act.

The Employer also challenged the ballots of two assistant leads on the basis that they are supervisors. The hearing officer recommended that these challenges be overruled because the Employer did not meet its burden of proving supervisory status. The Employer excepts to this recommendation. We find no merit to the Employer's exception, and, for the reasons stated by the hearing officer, we adopt this recommendation. Thus, for purposes of the second election, the leads should be excluded from the unit and the assistant leads should be included in the unit.

The Objections

I. BACKGROUND

The Employer filed three objections to conduct affecting the results of the election, alleging: (1) supervisory taint (consisting of nine subparts[4]), (2) surveillance/intimidation by a union agent during the election, and (3) union forgery/alteration of Board documents. The hearing officer recommended that each objection be overruled.[5] She evaluated the alleged misconduct under *Sutter Roseville Medical Center*, 324 NLRB 218 (1997), finding that none of the alleged misconduct was objectionable because it contained no threats of reprisal or promises of benefits, and because the Employer held weekly meetings in which it expressed its antiunion stance.

The Employer excepts to the hearing officer's recommendations as to Objections 1 and 3. As will be explained more fully below, we find merit in the Employer's exceptions regarding Objections 1(a)(soliciting union authorization cards), 1(d)(threats of reprisals), and 1(e)(interrogations), and we set aside the election based upon this objectionable conduct. Given our disposition of the case on those grounds, we find it unnecessary to pass on the hearing officer's recommendations to overrule the remainder of Objection 1 and Objection 3.[6]

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[1] We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers International Union from the AFL–CIO effective July 29, 2005.

[2] Because we adopt, pro forma, the hearing officer's recommendation to sustain the challenges to six of the challenged ballots, the remaining challenges are no longer determinative.

[3] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings, except to the extent described in this decision with regard to the testimony of employee Goodell.

[4] (a) Solicitation of union authorization cards, (b) promising employees that, if the Union won the election, they would receive better wages, (c) promising employees that, if the Union won the election, certain management employees would be terminated, (d) threatening employees with reprisals if they did not support the Union, (e) interrogation, (f) ostracizing employees who did not support the Union, (g) attending union meetings and advocating union support, (h) granting time-off benefits to employees who supported the Union, and (i) surveillance or expressing prounion sentiment in the polling area during the election.

[5] While the hearing officer found that supervisors had solicited authorization cards, she assumed that this conduct occurred prepetition and reasoned that the Employer is precluded from raising the issue of prepetition taint for the first time in a postelection hearing. The hearing officer further found that only the conduct alleged in subparts d, e, f, g, and i occurred during the critical period, and thus she resolved the case on the basis of those allegations.

[6] While we find it unnecessary to pass on the Employer's remaining objections, this should not be construed as an endorsement of the hearing officer's analysis.

II. FACTS

The hearing officer found "overwhelming evidence" that the leads possess and exercise authority to discipline employees; grant and record time off; recommend the hire, re-hire, transfer or termination of employees; responsibly direct employees; modify the crews' schedules; and counsel, train, and evaluate employees. The evidence also establishes that the Area Operations Manager spends most of his time away from the plant covering the region; thus, the leads possess significant authority over day-to-day operations. The hearing officer found that at least four supervisors—Rork, Steen, Clark, and Rogers—solicited authorization cards from employees. Supervisor Clark, alone, solicited at least 13 employees who were on his crew. Clark also offered to collect signed cards, and he did in fact collect at least two cards signed by employees who testified at the hearing.

The hearing officer found that prounion supervisor Rogers, up until the time of the election, repeatedly made the following or a similar statement to his crew (consisting of 7–8 employees): "[I]f the union does not get in, everybody will probably be fired." In addition, employee Goodell testified that he heard supervisor Rogers say to his crew something to the effect of, "[E]ither vote for the union or I'll make your life a living hell." However, the hearing officer discounted Goodell's testimony regarding the "living hell" threat, finding that: (1) the witness did not place Rogers' statement within the critical period, (2) the testimony was adduced in response to a leading question, and (3) the testimony was too equivocal to support the objection.[7]

We disagree, and we find that the hearing officer erred in discounting this testimony.[8] Contrary to the hearing officer, we find that Rogers' statement was made during the critical period. The hearing officer noted Goodell's testimony that "whatever statement was made was right at the beginning the first or second week when things got going." The hearing officer, however, failed to place the statement in its appropriate context. Goodell's testimony placed the threat *within the first or second week of the six weeks before the election*, at "maybe four weeks before election." The petition was filed on May 12, 2000, and the election was held on June 23, 2000. Thus, the testimony places the threat within the critical period. Moreover, the statement itself refers to a "vote," from which we can, and do, infer that the petition had already been filed.

As to the asserted equivocal nature of the testimony, which the hearing officer said was adduced in response to leading questions, we agree with the Employer that the hearing officer's analysis was flawed. The hearing officer miscomprehended the nature of leading questions and erroneously disregarded or discounted testimony that she deemed elicited through leading questions. When the Employer's counsel initially asked Goodell generally if he had ever heard Rogers talking to employees about "union matters," Goodell responded: "I never—he would—I guess no." When subsequently asked the more specific question, "Did you ever hear him say to a group of his employees that either vote for the union or I'll make your life a living hell," Goodell recalled that Rogers said "something really close to that . . . " Even assuming that the question was leading, "Rule 611(c) of the Federal Rules of Evidence permits [the use of] leading questions when 'necessary to develop testimony.'" *U.S. v. O'Brien*, 618 F.2d 1234, 1242 (7th Cir. 1980), cert. denied 449 U.S. 858 (1980).[9] We find that Rogers made the alleged threat and that his statement was not ambiguous.

Finally, the hearing officer credited employee Parsons' testimony that supervisor Clark asked Parsons if he planned to vote for the Union or whether he was going to support the Union.[10] The hearing officer also credited employee Doud's[11] testimony that supervisor Rogers asked him about twice a week how he was going to vote and that he also heard Rogers similarly question employee Puffenbarger.[12] There is no evidence that the

[7] The hearing officer also appeared to discount the testimony because Goodell testified that he was not sure if Rogers was joking. However, as the hearing officer noted elsewhere in her report, the test is an objective one. *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995).

[8] Our dissenting colleague argues that we inaccurately state that the hearing officer discounted Goodell's testimony when, our colleague says, the hearing officer "thoroughly *discredited*" it. In support, the dissent quotes (in reverse order) selective portions of the hearing officer's report dealing with a different objection (promising benefits). Significantly, the dissent omits the hearing officer's actual finding: "I give his testimony *little weight*." Thus, the hearing officer did not discredit Goodell. When discussing the objection at issue (alleged threats), the hearing officer stated: "At best, Goodell's testimony is unclear and equivocal, at worst, it is inconsistent and unbelievable, not to mention the additional problem that it was in response to a leading question." We do not read this statement so much as a credibility determination, but as an extension of her mistaken approach, discussed below, to permissible questioning.

[9] Petitioner's counsel did not object to any of the questions.

[10] Parsons testified that Clark asked him these questions "about everyday."

[11] The hearing officer may have misspelled certain employees' last names. Employer Exhibit 2 references Jason Puffenburger and Brad Dowd. To avoid confusion, we spell employee names as the hearing officer did.

[12] Doud further testified that he also heard Rogers ask "a couple times around other people" how they were going to vote. The hearing officer did not discuss this testimony.

interrogated employees were open and active union supporters.

III. DISCUSSION

The Employer argues in its exceptions that the hearing officer erred in finding no objectionable conduct. We agree, based on the Board's recent decision in *Harborside Healthcare, Inc.*, 343 NLRB No. 100 (2004), in which the Board took the opportunity to clarify and restate Board law. The Board explained that the issue of whether prounion supervisory conduct upsets the laboratory conditions necessary for a fair election is determined by two factors:

> (1) Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question.
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> (2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

Id., slip op. at 4.

In addition, the Board reversed prior law concerning the solicitation of union authorization cards by supervisors.[13] Prior Board law held that the solicitation of authorization cards by supervisors is not objectionable where "nothing in the words, deeds, or atmosphere of a supervisor's request for authorization cards contains the seeds of potential reprisal, punishment or intimidation."[14] The *Harborside* Board held that such supervisory solicitations are inherently coercive absent mitigating circumstances.[15] Consistent with the Board's longstanding exception to the *Ideal Electric* rule,[16] the Board further concluded that the effects of this coercion may continue to be felt during the critical period between the filing of the petition and the election, even if the card solicitation occurred prior to the filing of the petition.[17] In *SNE Enterprises, Inc.*, 344 NLRB No. 81 (2005), a case involving facts similar to those at issue here, the majority held that retroactive application of *Harborside* is appropriate.

We find that the prounion supervisory solicitations, threats, and interrogations established in this case, considered together, and in light of the supervisors' broad authority over the unit employees, are objectionable under *Harborside* and are sufficient to materially affect the election results, as further described below.

Our dissenting colleague argues that *Harborside* was wrongly decided and that, even if it were correctly decided, it should not be applied retroactively. However, *Harborside* is Board law, and the Board applies it retroactively. *SNE Enterprises, Inc.*, 344 NLRB No. 81 (2005). Except for the matters noted below, our colleague does not argue that the objections are nonmeritorious under *Harborside*. Thus, we shall confine our discussion to those matters.

A. Objection 1(a)—Solicitation of Union Authorization Cards

As noted above, *Harborside* establishes that supervisory solicitation of authorization cards can be coercive, even if it occurs prior to the critical period. Given the broad authority that the involved supervisors had over the solicited employees, and in the absence of mitigating circumstances, we conclude that, under the first prong of *Harborside*, the supervisors' card solicitation is objectionable. Turning to the second prong, whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, we note that the election margin was 7 votes (even without regard to the challenged ballots), and that supervisor Clark, alone, solicited at least 13 employees. Thus, the second prong of the *Harborside* test is also satisfied with regard to supervisors' card solicitation.

Our dissenting colleague, citing *Glen's Market*, 344 NLRB No. 25 (2005), suggests that we should not "include" the solicitation of Elliott, because he was solicited by supervisor Rork rather than by his direct supervisor, Steen. We disagree. First, while it is true that supervisor Rork appears to have beaten supervisor Steen to the punch, so to speak, Elliott plainly testified that his supervisor, Steen, like Rork, was also busy soliciting and collecting cards. Thus, Elliott would reasonably conclude that his own supervisor, Steen, was as desirous of Elliott's signature as was Rork. Second, we do not view *Glen's Market* as standing for as broad a proposition as

[13] *Id.*, slip op. at 1.

[14] *Millsboro Nursing & Rehabilitation Center*, 327 NLRB 879, 880 (1999).

[15] *Harborside*, slip op. at 1.

[16] 134 NLRB 1275 (1961).

[17] *Harborside*, slip op. at 7–8 (citing, inter alia, *Lyon's Restaurant*, 234 NLRB 178 (1978); *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973); *Gibson's Discount Center*, 214 NLRB 221 (1974)).

the dissent suggests. In our view, neither *Harborside* nor *Glen's Market* stands for the proposition that supervisory conduct, no matter how coercive, targeted towards one who is not the supervisor's direct subordinate cannot be objectionable. The principles of *Harborside* are not rendered inapplicable simply because prounion supervisors target their coercive conduct only at the subordinates of other prounion supervisors. Where a group of supervisors are working together, as here, engaging in coercive prounion conduct, such conduct does not become nonobjectionable simply because some lines of supervision are crossed.

In *Glen's Market*, the Board examined the "nature and degree of supervisory authority possessed by those who engage in the prounion conduct" as one of several factors in the *Harborside* analysis. *Id.*, slip op. at 2. While the circumstances in *Glen's Market* resulted in a finding of no objectionable conduct, the circumstances in this case are distinguishable. For example, in *Glen's Market*, *none* of the prounion supervisory conduct was directed towards direct subordinates; here much of it was. Moreover, in *Glen's Market*, the supervisors' authority was limited, the Board relying solely on participation in the evaluation process to establish supervisory status; whereas here, there was "overwhelming" evidence that the leads possessed a wide range of supervisory authority to, among other things, discipline, change schedules, and effectively recommend hires and terminations.

Our dissenting colleague also takes issue with our finding objectionable Rogers' solicitation of Underwood. Rogers solicited Underwood while Underwood was an employee on Rogers' crew. Although it is true that Underwood was subsequently promoted, and the challenge to his ballot sustained, the dissent's argument goes to the second prong of the *Harborside* test. Thus, while Rogers' solicitation was objectionable at the time it was made, the dissent is correct that Rogers' solicitation of Underwood, at least by itself, ultimately could not have had an effect on the election. But that argument misses the point. We include Elliott's and Underwood's solicitations in our analysis because they show the wide reach of the supervisory solicitations occurring here. And, as we pointed out above, even assuming that Rogers' solicitation of Underwood by itself had no effect on the outcome of the election, supervisor Clark's solicitations, alone, are more than enough to satisfy the requirement of the second prong of the *Harborside* test.

B. Objection 1(d)—Threats of Reprisals

We also find Rogers' statements coercive and objectionable under the circumstances of this case. The hearing officer found that Rogers' statements were not objectionable, citing *B.J. Titan Service Company*, 296 NLRB 668 (1989). In *Harborside*, the Board overruled *B.J. Titan* "to the extent that it holds that a prounion supervisor's linking of job security to support of the union is never objectionable."[18] The *Harborside* Board also stated: "Whether such statements are coercive and objectionable will depend on the circumstances." Under the circumstances of this case, the supervisors clearly had the power to effectively recommend the discharge of employees. Employees, consistently subjected to the remark, "[I]f the union does not get in, everybody will probably be fired," could reasonably believe that they would be fired if they voted against the Union. Rogers made this point even clearer when he told his crew, "[E]ither vote for the union or I'll make your life a living hell." As with Clark's solicitation of authorization cards, Rogers' statements to the 7–8 employees on his crew could have materially affected the result of the election, with its 7 vote margin, even without regard to the challenged ballots or to the other conduct that we find objectionable. Therefore, we find that Rogers engaged in objectionable conduct by threatening employees with reprisals if they did not vote for the Union.

Our colleague says that Rogers did not say that *he* would discipline employees if the Union lost the election. But, even if he only said that employees would be disciplined, it is clear that he had the power to effectively recommend discipline. Thus, the employees would reasonably fear to act contrary to his wishes.

C. Objection 1(e)—Interrogations

Finally, we find that supervisors Clark and Rogers engaged in objectionable conduct when they asked employees how they were planning to vote. Although interrogation is not *per se* unlawful or objectionable, *Rossmore House*, 269 NLRB 1176, 1177 (1984), enfd. sub nom. *Hotel Employees and Restaurant Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), the test is whether, under all of the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by the Act. *Id.*; *Emery Worldwide*, 309 NLRB 185, 186 (1992). In evaluating the "totality of the circumstances," the Board considers such factors as: whether the interrogated employee is an open and active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, the place and method of the interrogation, the truthfulness of the reply, whether a valid purpose for the interrogation was communicated to the employee, and whether the employee was given assurances against reprisals. *Rossmore House*, 269 NLRB at 1178 fn. 20; *Bourne v. NLRB*,

[18] *Harborside*, slip op. at 8–9, fn. 24.

332 F.2d 47, 48 (2d Cir. 1964); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985). Moreover, as emphasized above, an interrogation need not be accompanied by an express threat of reprisal or promise of benefit to constitute objectionable conduct.

We find that here, the hearing officer ignored the totality of the circumstances in evaluating the interrogations. As in *Demco New York Corp.*, 337 NLRB 850, 851 (2002), "the questioning did not occur in a context free of other coercive conduct." In fact, the interrogations here were occurring *along with* the card solicitations and the threats discussed above, and they were made by supervisors with broad authority over their crews. Moreover, there is no evidence that the interrogated employees were open and active union supporters. *Id.* at 851. Thus, we conclude that the supervisors' interrogations of employees were objectionable. Considered in conjunction with the other conduct that we find objectionable, the supervisors' actions in this case could have interfered with employee free choice to such an extent that it materially affected the outcome of the election.

CONCLUSION

In sum, applying *Harborside*, we find that the supervisors' solicitation of authorization cards constitutes objectionable conduct. We also find that the threats of reprisals and interrogations by prounion supervisors are objectionable. Viewed in light of the supervisors' extensive authority, the evidence demonstrates a preelection plant atmosphere tainted by objectionable conduct. Such an atmosphere reasonably tends to interfere with the employees' exercise of free choice in the election. Accordingly, the election must be set aside and a new election held.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by United Food & Commercial Workers Local Union 230.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. September 30, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting:

Continuing down the errant path on which they first set out in *Harborside Healthcare, Inc.*,[1] my colleagues erroneously set aside this election largely because some supervisors gave union authorization cards to some employees. Contrary to the hearing officer's recommendations, the majority also errs in sustaining the Employer's

[1] 343 NLRB No. 100 (2004) (Member Walsh and I dissenting). *Harborside* issued subsequent to the hearing officer's report on objections and challenged ballots in this case, but is being applied here retroactively, based on *SNE Enterprises, Inc.*, 344 NLRB No. 81 (2005). I dissented in *SNE Enterprises* from the Board's decision to apply retroactively its new rule as to supervisory solicitation of cards. For the reasons stated in that dissent, I would also not apply the new rule retroactively here.

objections to the election based on alleged threats of reprisal and interrogations by prounion supervisors.

Supervisory solicitation of union authorization cards.

The hearing officer found that some supervisors gave union authorization cards to some employees, but that the evidence did not show that any employees were coerced in any way.[2] I have earlier explained my view that the Board was wrong to change the law in *Harborside* about supervisory solicitation of union authorization cards,[3] and wrong again in *SNE Enterprises*, above, to apply the changed law retroactively.

Applying the Board's traditional approach, pre-*Harborside*, here we would find that the supervisors' providing cards to employees would not reasonably have tended to coerce the employees into voting for the Union. The Employer openly opposed the Union, and the employees thus had little to fear from the Employer's prounion supervisors handing out union authorization cards in defiance of the Employer. Furthermore, no other circumstances made the supervisors' participation in the distribution of cards coercive.

The hearing officer analyzed the evidence under precedent that was applicable at the time of the events in question[4] and found that the evidence did not support the Employer's contention that the employees were coerced to sign cards. More specifically, she found no evidence of threat of reprisal or promise of benefit in conjunction with the supervisors' providing cards. Thus, she found, consistent with precedent, that the evidence fails to establish that anything in the words or deeds of the supervisors, or the atmosphere in which they provided cards to employees, contained the seeds of potential reprisal, punishment or intimidation. I agree with that assessment of the evidence and with the hearing officer's recommendation to overrule this objection.

Alleged threats of reprisal for not supporting the Union.

The majority finds that statements made by Tom Rogers to the 7–8 employees on his crew were coercive and objectionable because, as a supervisor, Rogers had the power to effectively recommend the discharge of employees. In so holding, the majority reverses the hearing officer's credibility determinations about the testimony of an employee witness.

At various times, supervisor Rogers told the employees on his crew that everybody, including him, would probably get fired if the Union did not get in. He did not, however, tell them that *he* would discipline them, have them disciplined, or make their working conditions more difficult if the Union lost. Moreover, the Employer was openly opposed to the Union. It held weekly meetings with employees in which it expressed its antiunion stance. Every witness at the hearing who testified on this point indicated that there was no doubt that the Employer did not support the Union. There could be no confusion in the employees' minds about where the Employer stood on unionization, and the notion that employees would likely fear reprisals from Rogers if they voted against the Union makes no sense.

Employee witness Timothy Goodell was asked by the Employer's counsel if Goodell ever heard Rogers talking to employees about union matters. Goodell replied, "I never—he would—I guess no." The Employer's counsel subsequently asked Goodell whether Goodell had ever heard Rogers say to a group of employees that if they did

[2] In sustaining the Employer's objection, the majority includes the authorization card given to Ryan Elliott by supervisor Brian Rork. But Rork was not Elliott's supervisor, and therefore his giving Elliott a card was not objectionable even under the majority view in *Harborside*, above, as subsequently explained in *Glen's Market*, 344 NLRB No. 25 (2005) (two managers' initiation of union organizing campaign, and a manager's request that employees sign union authorization cards, distribute cards to other employees, and join the organizing committee, not objectionable under *Harborside* where the managers in question did not have supervisory authority over the employees to whom the alleged objectionable conduct was directed).

The majority asserts that *Glen's Market* does not apply here. Its labored logic goes as follows: while Elliott's supervisor, Tim Steen, did not ask Elliott to sign a card, Steen did ask other employees to do so, and Elliott was aware of that; thus, Elliott would understand that Steen wanted Elliott to sign a card as badly as Rork wanted him to, and Rork's asking Elliott to sign a card was therefore as coercive as if Steen himself had asked Elliott to do so. That analysis strips *Glen's Market* of any meaning. My colleagues also assert that the supervisors in this case had more supervisory authority over their subordinates than the supervisors in *Glen's Market. The point is, however, that Rork had no supervisory authority over Elliott.* The import of *Glen's Market* is that an employee reasonably could not be affected by conduct directed at him by a prounion supervisor who does not supervise that employee. My colleagues refuse to follow their own recent decision in that case.

The majority also includes the card given by supervisor Tom Rogers to Paul Underwood. But Underwood was promoted to supervisor about a month before the election, and the challenge to his ballot has accordingly been sustained. Therefore, Rogers' asking Underwood to sign a card could not have had any effect on the election. My colleagues nevertheless include the solicitation of Underwood to show the wide reach of the supervisory solicitations occurring here. But the issue here is whether the supervisory solicitation of employees to sign union authorization cards affected the result of the election. Rogers' solicitation of Underwood to sign a card could not have affected the result of the election, because Underwood's vote does not count.

[3] Prior to *Harborside*, supervisory solicitation of authorization cards was presumptively not objectionable, where the employer had clearly communicated an antiunion position and "'nothing in the words, deeds, or atmosphere of a supervisor's request . . . contained the seeds of potential reprisal, punishment, or intimidation.'" *Millsboro Nursing & Rehabilitation Center*, 327 NLRB 879, 880 (1999), quoting *NLRB v. San Antonio Portland Cement Co.*, 611 F.2d 1148 (5th Cir.), cert. denied 449 U.S. 844 (1980). The *Harborside* Board overturned this principle.

[4] *Millsboro Nursing & Rehabilitation Center*, above; *Sutter Roseville Medical Center*, 324 NLRB 218 (1979).

not vote for the Union, Rogers would "make your life a living hell." Goodell replied, "I actually did not 100 percent sure of that [sic.] but I do—it seems to me there was something really close to that that he was just—but you never knew with [Rogers], whether he was joking or, you know, telling the truth."

The majority says that the hearing officer erroneously "discounted" Goodell's testimony. That is inaccurate. The hearing officer did not merely "discount" Goodell's testimony. She thoroughly *discredited* it. Here is what the hearing officer found about Goodell's testimony in general:

> Goodell was not a credible witness. His testimony was completely inconsistent, he had no ability to fix dates, times, individuals present or the conversations that actually occurred. Additionally, Employer's counsel improperly led [Goodell] entirely through his testimony and much of what [Goodell] said was based on speculation and hearsay.
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> . . . [Goodell] could not testify as to what was actually said . . . except to agree with the Employer's counsel who continually led [Goodell] through his testimony, supplied dates and times and the number of people present and supplied words that Rogers allegedly said.[5]

More specifically, the hearing officer found that Goodell's testimony about Rogers' alleged "living hell" remark was "too equivocal" to allow the hearing officer to recommend sustaining this objection on the basis of that remark. The hearing officer found that "[a]t best, Goodell's testimony is unclear and equivocal, at worst it is inconsistent and unbelievable."

My colleagues acknowledge that the Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that the resolutions are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). But they have established no evidentiary basis for overruling the hearing officer's discrediting of Goodell's testimony, and they are therefore wrong to rely on that testimony.

Alleged interrogation.

Brad Doud testified that about twice a week, Rogers asked him how he was going to vote, and that Rogers also asked Jason Puffenbarger the same question (although Doud did not know when). Also, Justin Parsons testified that supervisor Willie Clark asked him either whether Parsons planned on voting for the Union, or whether Parsons was going to support the Union. Parsons could not, however, recall when this conversation occurred, other than to say that it was either toward the beginning or the end of the Union's campaign.[5] The hearing officer overruled this objection on the grounds that the questioning by these prounion supervisors was not accompanied by any threats of retaliation or promises of reward.

I agree with the hearing officer's analysis of the evidence and overruling of the objection based on alleged interrogation on the grounds that the questioning by these prounion supervisors, employed by an antiunion employer, was not accompanied by any threats of retaliation or promises of reward.

For all of these reasons, I would issue the Union a Certification of Representative.[6]

Dated, Washington, D.C. September 30, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

[5] Although this blanket rejection of Goodell's testimony appears in the hearing officer's preceding discussion of another objection, that is simply because that was the first place in her report where she needed to address Goodell's credibility. But the hearing officer's above-quoted findings are, by their express terms, a rejection of virtually all of Goodell's testimony.

[5] At one point, however, Parsons testified that Clark asked him these questions almost every day. The hearing officer did not recount that testimony, and her decision not to do so strongly implies that she discredited it.

[6] I do agree with my colleagues' adoption of the hearing officer's finding that the assistant leads are not supervisors and her consequent overruling of the Employer's challenges to their ballots.